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1	Robert A. Weikert, State Bar No. 121146 rweikert@nixonpeabody.com John A. Chatowski, State Bar No. 174471
2	John A. Chatowski, State Bar No. 174471 jchatowski@nixonpeabody.com
3	NIXON PEABODY LLP One Embarcadero Center, Suite 1800
4	San Francisco, CA 94111 Telephone: (415) 984-8200
5	Facsimile: (415) 984-8300
6	Attorneys for Plaintiff, BISCOTTI, INC.
7	Biscotti, inc.
8	
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12	UNITED STATES DISTRICT COURT
13	NORTHERN DISTRICT OF CALIFORNIA
14	NORTHERN DISTRICT OF CALIFORNIA
15	BISCOTTI, INC., California corporation Care N/ 00
16	Plaintiff, Plaintiff, Complaint For Copyright S2
17	v. INFRINGEMENT
18	TARGET CORPORATION, a Minnesota
19	corporation, DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR
20	Defendants. PERSONS/CORPORATE DISCLOSURE
21	
22	Plaintiff Biscotti, Inc. ("Plaintiff" or "Biscotti"), by its attorneys Nixon Peabody LLP, for its
23	Complaint against Defendant Target Corporation ("Defendant" or "Target"), alleges as follows:
24	1. This is an action for copyright infringement in violation of 17 U.S.C. §§ 501 et seq.
25	<u>PARTIES</u>
26	2. Plaintiff is a corporation formed under the laws of the State of California with its
27	principal place of business in Alameda County, California.
28	m
	-1-

3. Plaintiff is informed and believes, and on that basis alleges, that Defendant is a Minnesota corporation with its principal place of business in Minneapolis, Minnesota.

JURISDICTION AND VENUE

- 4. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 because the case concerns a question arising under the laws of the United States of America, and under 28 U.S.C. § 1338 because this is an action for copyright infringement.
- 5. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claim occurred in this judicial district.
- 6. Pursuant to Local Rule 3-2(d), this action is properly filed in the Oakland Division because a substantial part of the events or omissions giving rise to the claims for relief asserted by Plaintiff occurred in Alameda County, California.

FACTUAL BACKGROUND

- 7. Plaintiff has been manufacturing and designing children's clothing for over twenty years, including swimwear, dresses, sportswear and outerwear. Plaintiff's clothes, which have won numerous industry awards, consist of unique, company-created patterns, materials, and designs, and are sold under the Biscotti®, Kate Mack®, baby biscotti®, and Bobby Mack™ brands in Nordstrom's, Bloomingdale's, Von Maur, Neiman Marcus, Saks Fifth Avenue, as well as boutique and specialty stores across the United States, Canada, the UK, Italy, Spain, Holland and Germany. Biscotti is the owner of all copyrights and other intellectual property in its products and associated with its business.
- 8. Plaintiff promotes its products through advertisements in trade and retail publications, attendance of tradeshows, and its website. Plaintiff's clothing is the subject of numerous news articles focusing on Plaintiff's innovative designs. Plaintiff has received numerous prestigious "Earnie" awards for design excellence. The Earnie Awards are voted on by a cross-section of industry experts, including fashion editors from both trade and consumer publications, representatives from children's clothing buying offices and an array of national and specialty retailers. The top three nominees in each category are listed on a final voting ballot, which is distributed to a diverse selection of "Earnshaw's" retail subscribers across the country.

- 9. Plaintiff is the owner of United States Copyright Registration VA 1-651-205, entitled "BORA BORA #127." The Bora Bora design was first created by Plaintiff in 2006. True and accurate photographs of the Bora Bora design are attached hereto as Exhibit A. A true and correct copy of the Certificate of Registration for Copyright Number VA 1-651-205 is attached hereto as Exhibit B.
- 10. Plaintiff first incorporated the Bora Bora design into its product line as part of its "Age of Aquarius" line of swimwear in 2007. These garments were sold to multiple retailers, including Bloomingdales, Neiman Marcus, Nordstrom's, and Saks Fifth Avenue. True and accurate photographs of Plaintiff's Age of Aquarius swimwear incorporating the Bora Bora design are attached hereto as Exhibit C.
- 11. Plaintiff recently learned that Target has been selling swimwear that is virtually identical to Biscotti's "Age of Aquarius" line of swimwear. Indeed, the Target item (called "Toddler Girls' Circo® 1-pc. Pucci Swim- Pink/Green/Blue") (hereinafter the "Infringing Product") is so similar in design and appearance to Biscotti's "Age of Aquarius" line of swimwear with the Bora Bora design that one "reviewer" of the item on the Target.com website characterized it as "almost the perfect twin to boutique children's clothing designer Kate Mack's "Age of Aquarius" swimsuit line from 2008." *See* Exhibit D hereto. A true and accurate copy of a page from the Target.com website displaying the Infringing Product for sale is attached hereto as Exhibit E.
- 12. Plaintiff is informed and believes, and on that basis alleges, that the Defendant has sold thousands of the Infringing Products though its web site and at its retail stores. Plaintiff is informed and believes, and on that basis alleges, that Defendant had access to Biscotti "Age of Aquarius" line of swimwear bearing the Bora Bora design prior to the launch of the Infringing Products for sale bearing designs substantially similar to Plaintiff's design.
- 13. Plaintiff is informed and believes, and on that basis alleges, that Defendant intentionally and in bad faith copied Plaintiff's copyrighted Bora Bora design.
- 14. On or about July 15, 2009, Biscotti, through its undersigned counsel, sent Target a letter informing the company of the infringing product and requesting that it immediately stop selling the product on its website and through its retail stores. On or about July 21, 2009, Target responded

to this letter requesting further information and a copy of Biscotti's registration of copyright. Biscotti promptly provided a copy of its registration as well as a color copy of the specimen submitted with the registration form (as also requested by Target). On or about July 22, 2009, Target sent a letter indicating that the subject product had been purchased from a "vendor," that Target expects its vendors to take responsibility for their products, and consequently Biscotti would be hearing from the "vendor" or its counsel "soon." The letter also stated that the product would only be removed from Target's website "upon instruction from the vendor." Despite several further requests from Biscotti's counsel, to date no communication has ever been received from the alleged "vendor" and Target did not respond to these subsequent requests. Despite being on notice of its infringing activity, Target has continued to advertise and sell the infringing product on its website and through its stores and is still doing so as of the date of this complaint.

CAUSE OF ACTION—COPYRIGHT INFRINGEMENT

- 15. Plaintiff repeats and realleges paragraphs 1-13 as if set forth fully herein.
- 16. The Biscotti "Age of Aquarius" line of swimwear includes original designs owned by Plaintiff, including the Bora Bora design, which constitutes copyrightable subject matter under the laws of the United States.
- 17. Plaintiff has complied fully with 17 U.S.C. §§ 101 et seq., the statutory deposit and registration requirements thereof, and all of the laws governing federal copyrights, to secure the exclusive rights and privileges in and to the copyright for the Bora Bora design, and has filed the requisite application and obtained from the Register of Copyrights Certificate of Copyright Registration Number VA 1-651-205 covering the Bora Bora design.
- 18. Since the date the Bora Bora copyright was published, Plaintiff has owned the Bora Bora copyright and owns all copyright interests in the Bora Bora design.
- 19. Plaintiff is informed and believes, and on that basis alleges, that since at least as early as the summer of 2009, Target has willfully infringed and continues to willfully infringe Plaintiff's copyrights in its Bora Bora design. In particular, Target has copied the original Bora Bora design and, without Plaintiff's consent, has distributed girls' swimwear that includes a design substantially similar to Biscotti "Age of Aquarius" line of swimwear with the Bora Bora design.

- 20. Exhibit E attached hereto reveals the substantial similarity between Plaintiff's copyrighted Bora Bora design and Target's Infringing Product
- 21. Target's copying of Plaintiff's copyrighted design constitutes copyright infringement in violation of 17 U.S.C. §§ 501 et seq.
- 22. Unless restrained and enjoined by this Court, Target will continue to infringe Plaintiff's Bora Bora copyright.
- 23. As a direct consequence of Target's infringement, Plaintiff has suffered irreparable injury. Plaintiff will continue to suffer irreparable injury unless the Court enjoins Target from infringing Plaintiff's Bora Bora copyright.
- 24. Plaintiff is informed and believes, and on that basis alleges, that Target has derived, received and will continue to derive and receive gains, profits and advantages from its infringement, including gains, profits and advantages not presently known to Plaintiff, and Plaintiff has been and will continue to be greatly damaged in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests judgment against Defendant as follows:

- 1. That Target and its officers, agents, servants, employees and attorneys, and all those persons in active concert or participation with them, be forthwith preliminarily and thereafter be permanently enjoined, pursuant to 17 U.S.C. § 502, from:
 - Copying, reproducing, creating derivative works of, distributing, using,
 marketing, or selling Plaintiff's Bora Bora design, or any substantially similar
 variation of Plaintiff's design in any manner; and
 - b. Otherwise infringing Plaintiff's copyright rights.
- 2. That Target be required to account to Plaintiff for any and all profits derived by Target and for all damages sustained by Plaintiff by reason of Target's actions complained of herein;
- 3. That Target be held liable and be ordered to pay Plaintiff all damages that Plaintiff has sustained resulting from Target's acts complained of herein, subject to proof at trial, and that Plaintiff be awarded the profits of Target derived by reason of said acts, or statutory damages, whichever is greater, all as determined by said accounting;

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1	1 4. That any statutory damages be inc	reased and awarded to Plaintiff pursuant to 17				
2	2 U.S.C. § 504;					
3	That Plaintiff recover its costs, atte	orneys' fees and expenses of this suit from Target				
4	pursuant to 17 U.S.C. § 505; and	o 17 U.S.C. § 505; and				
5	5 6. That Plaintiff be awarded such oth	That Plaintiff be awarded such other and further relief as the Court may deem just and				
6	6 proper.					
7	7 Dated: August 21, 2009 NIX	ON PEABODY LLP				
8	8	11/4/11/1				
9	9 By	Robert A. Weikert				
10	II .	John A. Chatowski Attorneys for Plaintiff,				
11	11	BISCOTTI, INC.				
12	12.					
13	13					
14	DEMAND FO	R JURY TRIAL				
15	Plaintiff BISCOTTI, INC. hereby demand	s a trial by jury on all issues triable of right by a				
16	jury that are raised for determination by this Com	plaint.				
17	17 Dated: August 21, 2009 NIX	ON PEABODY LLP				
18		014/11.				
19	Ву	Pahart A. Wailrant				
20		Robert A. Weikert John A. Chatowski				
21		Attorneys for Plaintiff, BISCOTTI, INC.				
22		biscotti, inc.				
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28

<u>CERTIFICATION OF INTERESTED ENTITIES OR PERSONS/CORPORATE</u> <u>DISCLOSURE</u>

Pursuant to Civil Local Rule 3-16 and Federal Rule of Civil Procedure 7.1, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report and are no such parties to identify.

Dated: August 21, 2009

NIXON PEABODY LLP

Ву

Robert A. Weikert John A. Chatowski

Attorneys for Plaintiff, BISCOTTI, INC.

#12662808

-7-

Exhibit A

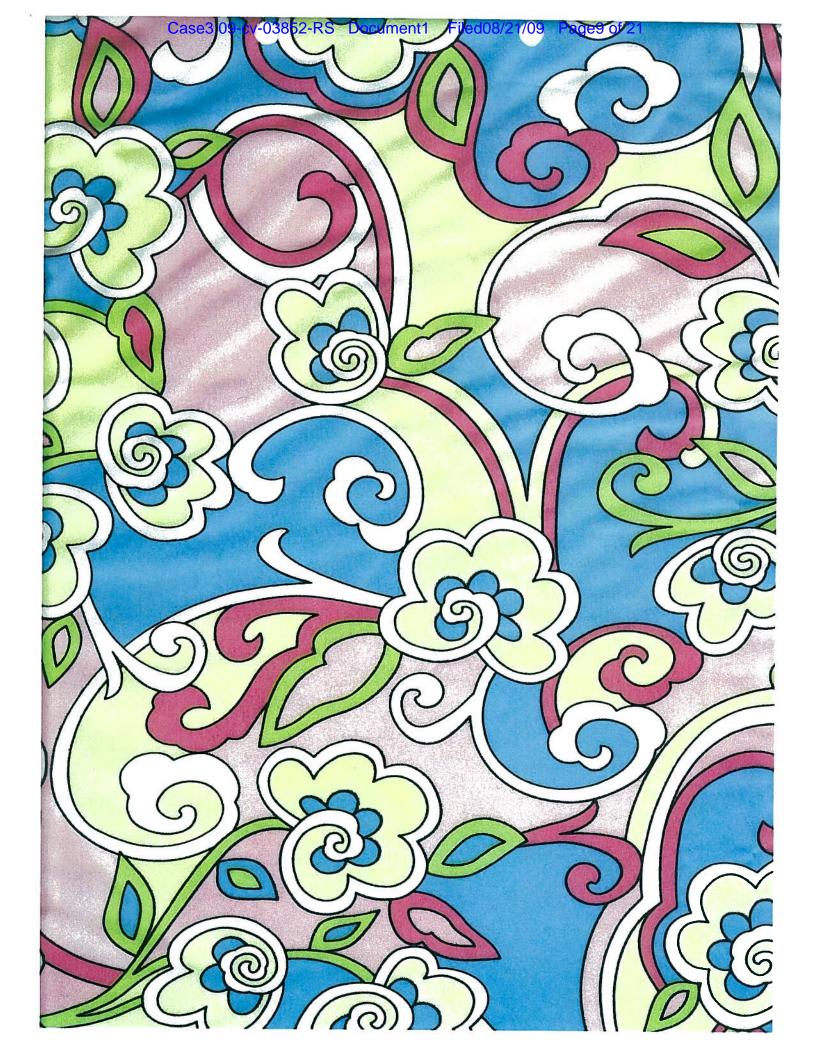


Exhibit B

Certificate of Registration



This Certificate issued under the seal of the Copyright' Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Register of Copyrights, United States of America

Registration Number:

VA 1-651-205

Effective date of registration:

November 10, 2008

15 18	E) 1000) Ø	N N
Title —	Title of Work:	BORA BORA #127		140 S. S.
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Copyrigl	ht claimant Copyright Claimant:	BISCOTTI, INC.	200 60 50	
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17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than \$2,500.

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Exhibit C

Case 3:09-cv-03852-RS Document 1 Filed 08/21/09 Page 16 of 21 KALE MACK - SPRING 2008

AGE OF AQUARIUS - A/R - 11/30/07 X-FACTORY



501KCL PINK 3-9M \$22.00 501KCA PINK 12-24M \$22.00 501KCB PINK 2-4T \$23.00



502KCB PINK 2-4T \$23.00 502KCC PINK 4-6X \$24.00 502KCD PINK 7-16 \$25.00



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POPLIN: 506KCC PINK 4-6X \$20.00 506KCD PINK 7-16 \$22.00



FRENCH TERRY: 507KCC PINK 4-6X \$22.00 507KCD PINK 7-16 \$23.00



POPLIN: 508KCC PINK 4-6X \$14.00 508KCD PINK 7-16 \$15.00

AGE OF AQUARIUS - A/R - 11/30/07 X-FACTORY



KNIT & FRENCH TERRY: 509KCC LIME 4-6X \$29.00 509KCD LIME 7-16 \$32.00



POPLIN: 510KCAX PINK 1 SIZE \$12.00 510KCBX PINK 1 SIZE \$12.00 510KCCX PINK 1 SIZE \$12.00



511KCBX PINK 4/6, 7/9 \$12.00



512KCCX PINK 10/12, 13/2 \$13.00 512KCDX PINK 3/5, 6/8 \$14.00

Exhibit D

buying it again in another size for next year! I'm very picky about what my kids wear and I usually buy old navy or gap stuff, but this is just as stylish and much more affordable.

Was this review helpful to you?

1 out of 1 people found the following review helpful:

May 26, 2009

ADORABLE SUIT!

Reviewer: Rachel C. "teacher mama" (Florida) See all my reviews

I love this suit. The colors are very vibrant, much more so than the picture. In person it looks 70'sish. I ordered the 5T for my daughter who is 5 years old, but it was too big. The suit is so cute that I had to order the 4T too. She is long and thin and the 4T fits. It is of good quality and would recommend it.

Was this review helpful to you?

May 15, 2009

ABOSULTELY ADORABLE

Reviewer: Gwen's Mom (New York) See all my reviews

Love this suit. Love Circo. Keep up the great work with your products and prices!

Was this review helpful to you?

May 7, 2009

CUTE & UNIQUE!

Reviewer: MoMmaluvs2shop "Chae E." (NY) See all my reviews

I was browsing at Target online when I spotted this swimsuit and read the reviews, and so I went to the store today and looked for this and luckily I found the size that I'm lookin' for (the last one). They're cuter in person and yes I totally agree that this one really looks like it was made from a high end boutique brand. For the fraction of price, I would recommend this product.

Was this review helpful to you?

2 out of 2 people found the following review helpful:

April 27, 2009

SWIMSUIT HAS A HIGH-END BOUTIQUE "LOOK"

Reviewer: K. Simko (In suburban Philadelphia, PA USA) See all my reviews

I almost fell over when I found this suit at Target. It is almost a perfect twin to boutique children's clothing designer Kate Mack's "Age of Aquarius" swimsuit line from 2008. And those suits are much, much more pricey! This is a great bargain with a high-end designer look. It is a cute and well-made suit, but note: it does run at least one size small. I agree with a previous review, the colors are a bit more vibrant and less pastel in-person. Love it! And you can't beat the price.

Was this review helpful to you?

1 out of 1 people found the following review helpful:

April 16, 2009

PATIENTLY AWAITING SUMMER

Reviewer: C. Campbell (Pataskala, OH) See all my reviews

It is not even warm enough to wear this swimsuit yet where I live. However, there was only one

Exhibit E

Find a Store | About Target | Help

Sign In | Your Accou



GiftCards Registries + Lists

Women Kids Shoes Beauty Home Kitchen Bedding Patio Furniture Toys

Search

All Categories

Easy to give. Fun to get.



Shop GiftCards Now >

Clearance. Save 10%-75% on

Similar Categories

Circo

All Toddler Girls' Swim Toddler Girls' One-Piece

Top Vacation Picks - Girls' Swimwear



Zoom and View Larger

Prices, promotions, styles and availability may

vary by store and online.

Toddler Girls' Circo® pc. Pucci Swim -Pink/Green/Blue

(11 reviews)

free shipping when you spend \$50

Select Size ▼ O SIZIN

Quantity: 1

Sign-in for 1-Click

This item can be combined with other eligible items for the "free shipping wher spend \$50" promotion. Discount applied at Checkout. See offer details.